

In the meantime on July 30, 1974, the *respondent* had filed a suit in the Ipoh High Court against the appellants claiming simply the repayment of the full sum of \$200,000 (presumably Ratnavale had paid back some of the money) without in any way mentioning the transaction relating to the Bukit Merah Estate. During arguments of this appeal we were informed by Mr. Sivalingam on behalf of the appellants from the Bar that since then the *company* has been substituted for the respondent as plaintiff in that suit.

Mr. Sivalingam for the appellants strenuously argues before us that in view of the facts narrated above the respondent has no caveatable interest and that if anybody had it was the company, and that accordingly the court should order the removal of the caveat against these two lands.

Mr. Sivalingam argues —

- (1) that the learned judge was wrong in saying that —
 - (a) the interest claimed by the respondent was connected with the lands, the subject of the caveat; and
 - (b) the respondent had a registrable interest in the lands; and
- (2) that in view of the facts that —
 - (i) when the respondent applied for the caveat he stated in the statutory declaration that he was the beneficial owner of the lands while in his affidavit he claimed that the company was entitled to a charge over the lands as security; and
 - (ii) in the Ipoh High Court suit the respondent simply claimed for repayment of money, the learned judge should have held that the claim of the respondent was merely for the return of the money alleged to have been lent and that the respondent had no registrable interest that could be protected by a caveat.

With respect I do not think there is any merit in this appeal. The whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interests. It is not for us at this stage to say whether or not the respondent or whether or not the company has a good claim at law against the appellants, but it seems clear that there is evidence which if believed at the trial of the substantive issue would establish that the respondent who was managing director of the company was acting throughout on behalf of the company in regard to the money paid to Ratnavale, and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person *claiming* title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat, in my judgment it was proper for the respondent to enter the caveat, and right for the learned judge to refuse to remove it, so that it may remain on the register until the disposal of the suit pending between the company and the appellants

- A The receipt, if believed, will show that the money lent to Ratnavale was lent by the company and that it was the intention of the parties at the time that the loan should be secured by a charge over the lands concerned. To the argument that in that case the company alone has a caveatable interest, I agree with the argument on behalf of the respondent that, as the respondent was acting in his capacity as managing director of the company, both the respondent and the company have a caveatable interest in the lands.
- B

I would therefore dismiss this appeal with costs, the appellants' deposit to be paid to the respondent against his taxed costs.

- C **Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J. concurred.**

Appeal dismissed.

Solicitors: *Khong & Son; Gan Teik Chee.*

D

I. INVESTMENT LTD. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[F.C. (Gill C.J. (Malaya), Raja Azlan Shah & Wan Suleiman F.J.) June 13, 1975]

- E [Kuala Lumpur — Federal Court Civil Appeal No. 50 of 1973]

Income Tax — Transfer of immovable property by company to another company in exchange for shares — Isolated transaction — Surrounding circumstances — Whether trafficking in immovable property — Whether profits liable to income tax — Evidence of accounting practice — Income Tax Ordinance, 1947, s. 10(1)(a).

- F This was an appeal from the decision of Ong Hock Sim J. (reported in [1973] 2 M.L.J. 10). The appellant company one of whose objects was to traffic and otherwise deal in or turn into account immovable property, had acquired certain lands and had begun building operations on the lands. Subsequently it agreed to sell the lands and the uncompleted building on it to another company in exchange for shares in the company. These shares were subsequently transferred by the company. The company was assessed to tax on the profits obtained by it. On appeal, the Special Commissioners upheld the assessment and a further appeal to the High Court was dismissed. The appellant company appealed to the Federal Court.
- G

Held, dismissing the appeal: there was evidence in this case on which the Special Commissioners could conclude that the appellant company was carrying on a business in immovable property, so that the profits made were assessable to income tax.

- H Cases referred to:-

- (1) *Commissioners of Inland Revenue v. Reinhold* 34 T.C. 389, 392.
- (2) *California Copper Syndicate v. Harris* 5 T.C. 159.
- (3) *D.E.F. v. Comptroller of Income Tax* [1961] M.L.J. 55.
- (4) *E. v. Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117.
- (5) *Commissioners of Inland Revenue v. The Korean Syndicate* 12 T.C. 181, 202.
- (6) *John Smith & Son v. Moore* 12 T.C. 266, 282.
- (7) *Golden Horse Shoe (New) Ltd. v. Thurgood* 18 T.C. 280, 300.
- (8) *Heather v. P.E. Consulting Group Ltd.* 48 T.C. 293, 322.
- (9) *Commissioners of Inland Revenue v. South Behar Railway Co. Ltd.* 12 T.C. 712.

I

The following cases were also cited in argument: *Director-General of Inland Revenue v. C.K.K.* [1974] 2 M.L.J. 104; *The Commissioners of Inland Revenue v. Livingston & Ors.* 11 T.C. 538; *The Balgownie Land Trust, Ltd. v. The Commissioners of Inland Revenue* 14 T.C. 684; *The Commissioners of Inland Revenue v. The Hyndland Investment Company, Limited* 14 T.C. 694; *Lewis Emanuel & Son Ltd. v. White (H.M. Inspector of Taxes)* 42 T.C. 369; *Pickford v. Quirke (H.M. Inspector of Taxes)* 13 T.C. 251; *Taylor v. Good (Inspector of Taxes)* [1974] 1 W.L.R. 556; *Edwards (H.M. Inspector of Taxes) v. Bairstow & Anor.* 36 T.C. 207; *Scottish Investment Trust Co. v. Forbes (Surveyor of Taxes)* 3 T.C. 231; *The Commissioners of Inland Revenue v. The Eccentric Club, Ltd.* 12 T.C. 689; *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons, Ltd.* [1956] 3 All E.R. 624; *Turner v. Last (H.M. Inspector of Taxes)* 42 T.C. 517; *Western Gold Mines No Liability v. Commissioners of Taxation (W.A.)* [1938] 1 A.I. TR 255; *The Commissioners of Inland Revenue v. The Forth Conservancy Board* 16 T.C. 103; *St. Aubyn Estates Ltd. v. Strick (H.M. Inspector of Taxes)* 17 T.C. 412.

FEDERAL COURT.

Barry Pinson Q.C. (*Lim Ewe Hock* and *Miss Goh Kooi Choo* with him) for the appellants.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the respondent.

Raja Azlan Shah F.J.: The facts of this case are fully set out in the report of it in the court below, [1973] 2 M.L.J. 10. I need only hereinafter set out the salient points.

The question which arose in this appeal is the perfectly familiar question of whether the appellant company carried on business of trafficking in immovable property, *i.e.* buying and selling, within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947, so that the profits made would be profits assessable to income tax. This, in my view, is a question of law. The facts are found. Indeed, they were not at any time in dispute. The Memorandum of Association, the letter of April 27, 1962 sent by the Inland Revenue Department to the secretary of the appellant company and the reply thereto dated August 16, 1962, the balance sheets for the years 1962, 1963, 1965, 1966, the Deciding Order and Grounds of Decision, are part of the Case Stated. I observe that the Articles of Association are not made part of the case. It is now for the court to consider the various documents and the established facts and then to decide as to their legal nature and effect.

Now what is the business of the appellant company? I think it is important first to look at the nature and purpose of the company as expressed in the Memorandum of Association and have regard to them as an item of evidence when answering this question.

It seems to me that it is contemplated that the essential nature of its business is a business of doing what is necessary to carry out the objects which it elects to carry out. That is what it speaks of itself as its business. Indeed, "dealing in immovable property and land development" was the business of the appellant company as admitted by its secretary in his reply to the query raised by the respondent. This admission, which was mentioned in the Grounds of Decision as a matter of importance, is evidence against the appellant company and it must be noted that this admission was made long before the dispute relating

A to the new assessment arose. The relative weight to be attached to this piece of evidence was no doubt a matter essentially for the Special Commissioners.

B There are in all 30 objects incorporated in the Memorandum of Association, *inter alia*, power to traffic and otherwise deal in or turn to account buildings and immovable property of any description (cl. 3(i)), to develop and turn to account any land acquired and preparing same for building purposes (cl. 3(ii)), and to invest and to hold shares securities or investments or to sell realise and deal with the same and to re-invest the proceeds (cl. 3(xvi)). It also has power to carry on various kinds of business ranging from rubber planting to importing and exporting of watches and photographic goods (cl. 3(v)).

C Now I agree that those are only objects, and although the appellant company may do those things, it is not obliged to do them; and, in fact, reading the Memorandum of Association, it would be impossible for it to carry out all the objects which it is empowered to carry out by the Memorandum of Association.

D What happened was this. The appellant company was formed in January 1962, intending to do business on a very wide scale. Its financial position was not that sound, so it took a large bank overdraft of \$491,365.44 from Malayan Banking. It paid \$337,273.71 to purchase lands at Penang Road, on which it entered into contracts to put up a six-storey building with a shopping arcade and hotel ("the property"). The said building was to be completed by October 30, 1963 at a cost of \$585,000. When the ground, first and second floors were completed, they were leased out to tenants. In June, 1962, there was an offer to rent out the hotel rooms, but the negotiations fell through. In October, 1963, the business and undertaking of the company was reconstructed with a view, it was alleged, to expand its business of investment in securities. In pursuance of these new objects, it transferred the property, which was still in the process of completion, to Island Hotels and Properties (Malaysia) Ltd. and undertook to complete the building in exchange for 3½ million shares of \$1.00 each in the latter company all credited as being fully paid.

H The appellant company acquired no other land. But in 1962 it held shares worth \$175,000 in four other companies. In 1963 it received \$7,044 by way of rent of the arcade. In that year also it incurred a loan of \$422,500 from Disco Ltd. By December, 1963 and January, 1964 it had not only transferred away all the shares in the four companies to other person or persons unknown, but also all the Island Hotels shares to Disco Ltd. (2½ million shares) and Tan Sim Hoe (1½ million shares), two distinct legal persona. The appellant company was still a going concern. In 1965 there was a large bank overdraft of \$101,575.11 cts.

I From the exchange, the appellant company made a profit of \$1,704,061 worth of shares. The respondent considered this amount as income from business carried on by the appellant company and therefore made an additional assessment on that amount. The respondent also assessed the sum of \$7,044 as being the gross amount of rentals received from the arcade. In arriving at the income of \$7,044, the respondent

had not made any deduction from the gross amount of rentals in respect of interests on overdrafts taken to finance the construction of the said building, on the ground that to allow such deduction would mean allowing more than one deduction of the said expense.

The Special Commissioners determined that the appellant company was carrying on the business of trafficking in immovable property pursuant to its declared object stated in clause 3(i) of its Memorandum of Association, and that the profits obtained from the transfer of the said property were profits from business assessable to income tax.

Both parties conceded before the Special Commissioners that if they (the Special Commissioners) decided to dismiss the appeal, no change should be made in the deduction in respect of interests, but if they allowed the appeal, both parties would try to agree on the adjustments on the amount of interests to be deducted from the total amount of rentals and failing such agreement the amount to be deducted should be fixed by the Special Commissioners.

The appellant company was not satisfied with the decision of the Special Commissioners and a case was stated for the High Court.

The High Court held, following *The Commissioners of Inland Revenue v. Reinhold*⁽¹⁾ that the transfer of a half-completed building, or putting it accurately, the transfer of a building in the process of completion, with all its attendant obligations, in exchange for shares in a realty company was an incursion into the realm of trade and therefore the profits and gains therefrom were plainly liable to tax.

The question to be asked and answered is whether the facts reveal a realisation of income from business of trafficking in immovable property carried on by the appellant company? As in most cases of this kind a wealth of authorities was cited, ranging from the familiar case of *California Copper Syndicate v. Harris*⁽²⁾ down to the local case of *D.E.F. v. The Comptroller of Income Tax*⁽³⁾ and the recent case of *E. v. Comptroller-General of Inland Revenue*.⁽⁴⁾

I think it right to emphasise what has already been treated judicially that cases on income tax depend so much on their peculiar facts that excessive reliance on precedents may be dangerous. Whether the appellant company was carrying on business of trafficking in immovable property must, in the last analysis, depend on all the surrounding circumstances, so that no single criterion can be formulated.

The argument addressed to us by Mr. Pinson on behalf of the appellant company took several shapes. He listed a number of factors which, he said, pointed to investment rather than trafficking in immovable property, namely:—

- (a) The company was an international investment company and investment was one of its objects as authorised by the Memorandum of Association;
- (b) The assets, i.e. the shares, in the single transaction was of a kind normally used for investment but not for trading;

- (c) As early as 1962 there were negotiations to rent the hotel rooms;
- (d) The three floors were rented out to tenants;
- (e) There was no evidence that the property was predestined to be sold;
- (f) The 1963 resolution referred to the expansion of the investment business and the company did in fact expand its investments, i.e. substituting one investment for another;
- (g) The intention of the company could be gauged from the Memorandum of Association and what business it actually carried on. And the latter could be seen from the statement of accounts which pointed to investment, for example, there was no stock of land which was circulated, and the profit from the transfer of the property was carried to reserve as capital profit as would normally be the case with a capital investment.

The pith and substance of Mr. Pinson's argument may be summarised as follows. There were no facts on which the Special Commissioners could properly have concluded that the appellant company was trafficking in immovable property. He submitted that buying and selling is implicit in trafficking; an isolated transaction was not trafficking; and therefore the Special Commissioners' decision was plainly wrong. At its highest it was argued that the isolated transaction was an adventure in the nature of trade and this was not caught by the net of section 10(1)(a) of the Income Tax Ordinance, 1947, as trade in the Ordinance does not include an adventure in the nature of trade.

Counsel relied at great length on Gill F.J.'s (as he then was) judgment in *E. v. Comptroller-General of Inland Revenue*, *supra* which he said should be followed.

In my view, *E. v. Comptroller-General of Inland Revenue* provides a very helpful glossary and collection of references to the cases concerning the definition of the word 'business' in the context of section 10(1)(a) of the Income Tax Ordinance, 1947. That case is the latest in a series of (local) cases that have ventilated, rather than solved, the difficulties of giving a sharp definition of the word "business". However, I find it unnecessary to review the case in any detail for I find it is clearly distinguishable on certain material respects and decided on its own special facts. It is sufficient to say that that case involved an individual dealing in an isolated transaction which was not part of the business carried on by him. It is here that it is important to bear in mind the fundamental distinction between an individual and a limited company as the test to be applied in each case is not quite the same. In this connection, it is well to quote a passage from the judgment of Buttrose J. in *D.E.F. v. The Comptroller of Income Tax* (page 59):

"the test to be applied in the case of an individual is not quite the same as the test in the case of a trading company. Though as a general rule in the case of an individual one or two isolated transactions cannot be described as the carrying on of a business, in the case of a company the fact that there has only been one profit-making transaction is in no way decisive of the question whether the profit was made in the carrying on of the company's business or otherwise."

Lord Sterndale M.R. too recognised this distinction as a criterion in determining whether a company is carrying on business or not in *The Commissioners of Inland Revenue v. The Korean Syndicate, Ltd.*⁽⁵⁾:

"I do not assent, either, that there can be no difference between an individual and a company. If you once get the individual and the company spending exactly on the same basis, then there would be no difference between them at all. But the fact that the limited company comes into existence in a different way is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for the particular purpose of carrying out a transaction by getting possession of concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not."

Encik Nizar for the respondent submitted that in order to answer the question in issue we must look at the Memorandum of Association which might lend a helping hand in ascertaining the main object and also all the facts in the Case Stated. He also listed certain items of evidence in aid of his case:

- (a) The appellant company was a limited company and the use of the word "Ltd." raised a strong presumption that it was intended to carry on business;
- (b) The admission by the appellant company's secretary that the nature of its business was "dealing in immovable property and land development" came from a person who had knowledge in the company's affair;
- (c) In view of its financial standing, the appellant company was in no position to develop the property and hence could not hold it for long and that was fortified by the quick sale and before completion;
- (d) The accounts were drawn up and audited by a firm of independent professional auditors.

With regard to item (a), Mr. Pinson stressed the point that there was no reference of it in the Special Commissioners' decision. That might be so, but the Memorandum of Association which was part of the Case Stated shows that the appellant company was a limited company. That disposes of counsel's submission.

Item (b) was traversed in this way. Counsel contended that very little weight should be attached to it. I think that this point can be answered very shortly by saying that that was a matter essentially within the province of the tribunal of primary fact.

Item (c) requires amplification. It was said by Mr. Pinson that the Special Commissioners commented that nothing turned on this point, and so they rejected it. Encik Nizar on the other hand submitted that in view of the large bank overdraft, the appellant company was not in a position to develop the property and that all along its intention was to speculate in the sale of the property. If it had not intended to speculate but to hold it as an investment it would take very many years for it to recover the money from rentals sufficient to repay the large bank overdraft. I find that the Special Commissioners had adequately dealt with this point viz: "Although it is not prudent for

any part of a company's fixed assets to be financed by loans, simply because if the loan creditors were to recall from the company the outstanding loans of the company, it would probably be left with no alternative but to sell all its assets and wind-up its affairs". Although it could be said, as indeed was said by Mr. Pinson, that it depended on the terms of the loan, I find there is a total lack of information as to the terms of the loan between the bank and appellant company. Lack of evidence on this point was a factor which no doubt had influenced the Special Commissioners in drawing the inference that all along the appellant company had intended to develop and sell the property.

With regard to item (d), the Special Commissioners stressed the importance of section 125 of the Companies Ordinance, 1940-1946 which made it obligatory for companies to distinguish between its fixed assets and floating or current assets in their balance sheets. They also stressed the importance that the financial accounts of the appellant company had been reviewed by a firm of independent professional auditors. They concluded that the costs of construction described as "work in progress" under current assets appearing in the balance sheet of 1962 aptly described "assets in the various stages of conversion into cash" in the ordinary course of business and that "items classified as current assets include stock-in-trade and work in progress". They held that if the property was intended to be a fixed asset, it ought to have been shown as such in the balance sheet and an appropriate description would probably have been "construction in progress". They strongly relied on a passage from *Spicer and Pegler's Book-Keeping and Accounts*, 15th Edition, page 3, and the Recommendation of the Council of the Institute of Chartered Accountants in England and Wales entitled "The Presentation of balance sheet and profit and loss account" in which it was stated that "the fundamental characteristic of fixed assets is that they are held with the object of earning revenue, directly or indirectly, and not for the purpose of sale in the ordinary course of business". They also referred to a passage of Viscount Haldane's speech in *John Smith and Son v. Moore*⁽⁶⁾ and of Romer L.J. in *Golden Horse Shoe (New), Ltd. v. Thurgood*.⁽⁷⁾

The Special Commissioners therefore took the view that the description and classification of the property by the auditors in the balance sheet was deliberate and could not have been a mistake as alleged by Mr. Pinson. They obviously rejected the submission of mistake. We are in no position to differ from them, that being a matter of credibility. In the matter of appreciating oral evidence, we attach great value to the opinion formed by the tribunal of primary facts.

This leads me to another point taken by Mr. Pinson. He contended that the ownership of the property never changed hands; the persons who constituted the appellant company continued to own it through another company, i.e. Island Hotels and Properties (Malaysia) Limited. But, in my opinion, the quick transfer of Island Hotels shares to 2 distinct legal persona let the cat out of the bag. Mr. Pinson then said may be those shares were held as security for those short term interest free loans taken from Tan Sim Hoe and Disco Limited who, it was alleged, held

those shares on trust for the appellant company. Counsel reinforced this contention by referring to the remarks of the auditors in the balance sheet for 1965 which stated that the said shares were registered in the names of Tan Sim Hoe and Chew Ming Teck, attorneys for Disco Limited, who had executed a trust deed. I cannot subscribe to Mr. Pinson's argument for the simple reason that what was said in the report of the auditors was all based on hearsay which cannot take the place of legal proof. The shares were never produced for the inspection of the auditors, nor was the alleged trust deed. Apart from this tenuous piece of evidence, none exists to support Mr. Pinson's contention. Perhaps it is pertinent to be reminded of a passage from the judgment of Lord Denning in *Heather v. P-E Consulting Group Ltd.*⁽⁸⁾:

"The courts have always been assisted greatly by the evidence of accountants. Their practice should be given due weight; but the courts have never regarded themselves as being bound by it. It would be wrong to do so. The question of what is capital and what is revenue is a question of law for the courts. They are not to be deflected from their true course by evidence of accountants, however eminent."

In my opinion, the form which a company takes is no criterion in determining the question whether it was carrying on business. To ascertain the business of a limited company, one must look at what business it actually carries on and not what business it professes to carry on. The Memorandum of Association affords information as to the object of the company. The acid test is to look at the nature and purpose and the substance of the transaction in question as expressed in its Memorandum of Association and, in doing so, one may go behind technicalities. As a general rule, the mere setting up of a company points to its business intention because of its implied continuity. That would be a strong presumption that it intends to do business.

It is necessary to recapitulate the facts. Tan Sim Hoe and Chew Ming Teck's wife floated a limited company to carry on a very extensive business. The essential features of the business was dealing in immovable property and land development. That was the admission of the company's secretary in answer to the respondent's questionnaire. It then negotiated a large bank overdraft. It bought 6 pieces of land, all at the same area, and then started developing them. First, the squatters had to be removed and their illegal structures demolished. Then the appellant company entered into separate contracts to do the piling work and the six-storey building. When the building was half completed, it negotiated to lease the hotel rooms but the negotiations fell through. The arcade was rented out to tenants and it collected \$7,044 as rentals in 1963. In October, 1963 it transferred the land and building which was still half completed to Island Hotels and Properties Malaysia) Limited in exchange for 3½ million shares. It made a profit of \$1,704,061. It was said for the appellant company that this was capital profit arising from the restructuring of the object of the appellant company with a view to expand its business of investment in securities. What did the Special Commissioners have to say on this point? They said that in view of the quick transfer of the Island Hotels shares, "they found it difficult to accept that the true object of acquiring those shares was

A in order to expand its investment; that the true object was not to expand or to hold investment in the shares is confirmed by the fact that all of the \$175,000 shares in four other companies held by the appellant company in 1962 were transferred away by the end of 1963". I concur with the Special Commissioners' conclusion. When we look at the transaction itself and its effect, it is not possible to describe what was done as an ordinary business of expanding capital investment. We cannot escape the conclusion that the principal purpose and effect of the transaction was the realisation of income from carrying on business in immovable property.

It has been said more than once that when we come to deal with income tax cases we must look at all the surrounding circumstances, not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing, in fact, whether there is evidence both ways — whether there is evidence upon which the Special Commissioners could arrive at their conclusion. Keeping in view what the appellant company in fact did, the purpose for which it came into existence and the objects which were prescribed in the Memorandum of Association and the whole of the other circumstances which I have briefly summarised, it seems to me that those were extensive series of dealings in immovable property over a period, and using for the purpose an organisation and methods such as are ordinarily adopted by property developers. When we look at all those circumstances, it is not possible to say that they do not constitute evidence upon which a tribunal of primary fact might arrive at a conclusion that it was carrying on business in immovable property. There are considerations, no doubt, the other way, and Mr. Pinson strongly called my attention to them, to which, if I were a judge of fact, I should certainly have given active consideration, but it is also important that I shall not slip into it. The question is of course a question of circumstances and degree, and there is no justification for reversing the determination of the Special Commissioners unless they had misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusion.

It is true that the transaction of transferring the property in exchange for shares was an isolated one. But that, in my opinion, was the essential nature of its business for which it came into existence. If it purchased immovable property and turned it to account in pursuance of its declared object as expressed in the Memorandum of Association, even for the first time only, then that is a matter to be considered when we come to decide whether doing that was carrying on business or not.

It seems to me that Mr. Pinson had attached undue importance to the fact that the actual operations of the appellant company had been an isolated one. If a company was formed to carry on business, and in fact it carried it on, I think, it cannot matter that its activities had been an isolated one. "Business is not confined to being busy; in many businesses long intervals of inactivity occur." (*per* Lord Sumner in *The Commissioners of Inland Revenue v. The South Behar Railway Co. Ltd.*⁽⁹⁾). A company's business may have been quiescent for a number of reasons.

For example, following a business set-back, consolidating its business, waiting for the ripe opportunity to occur. But there may also come a time when it will resume a more active business. Now when circumstances of that sort arise, it may be, I am not saying it would be one way or the other, the right conclusion in fact is that there is really a business of the company expanding over quite a period of time, which is not interrupted by its period of inactivity. If the company still carries it on, then I think the company is carrying on business.

The appellant company is still a going concern although it had not embarked on another project of dealing in immovable property as yet. Big projects or schemes such as the one in question which involve very large sums of money and are possibly carried on with the assistance of large bank overdrafts cannot be carried on in successive dealings and for obvious reasons.

In my view, the overwhelming material of the evidence is, to my mind, consistent with "carrying on business in immovable property" and that "the true and only reasonable conclusion" does not contradict the Special Commissioners' determination. They could reasonably decide, and were entitled to decide, as they did.

I would dismiss the appeal with costs.

Gill C.J. (Malaya) and Wan Suleiman F.J. concurred.

Appeal dismissed.

Solicitors: *Lim Cheng Poh & Co.*

BOH PLANTATIONS SDN. BHD. v. GUI NEE CHUAN & ORS.

[F.C. (Gill C.J. (Malaya), Ali & Wan Suleiman F.J.)
June 14, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 41 of 1974]

Trade Marks — Passing off — Get-up of tea packets — Likelihood of confusion — Whether get-up common to trade — Special conditions in rural areas.

The appellants had brought an action (a) for an injunction to restrain infringement by the respondents of the appellants' trade marks and (b) for an injunction to restrain the respondents from passing off or attempting to pass off for tea not the goods of the appellants as and for the goods of the appellants. The learned trial judge dismissed both the claims. The appellant appealed against the dismissal of the claim for passing off. The learned trial judge had held that putting the packet of tea produced by the appellants and that produced by the respondents side by side it could not be seriously suggested that the respondent's packet could be mistaken for the appellant's packet. He said that he was convinced that a person who treated the label fairly could not be deceived into thinking that the respondent's tea was the tea of the appellant.

Held, allowing the appeal: (1) the learned judge's findings of fact were against the weight of the evidence;

(2) the learned judge was wrong to dismiss as of no account the evidence as to the foil design and in holding that there was no similarity whatever in regard to the respective designs;

(3) the learned judge failed to give due consideration in the light of the evidence produced by the appellants, to the likelihood of confusion arising in rural areas where the smaller

A packets of tea are chiefly sold and where the packets of tea of both parties are displayed side by side and in circumstances where some illiteracy may be presumed to exist so that reliance has to be placed on the overall visual get-up of the packets;

(4) the learned judge was wrong in holding that the features of the plaintiff's get-up were common to the trade, when this was not admitted by the appellants and ought to have been strictly proved by the respondents, so that in all the circumstances of the case, the total absence of any evidence from the respondents in this regard had the result that the appellant's case remained unanswered and uncontradicted.

Cases referred to:-

- (1) *Reddaway v. Banham* [1896] A.C. 199, 204; 13 R.P.C. 218, 224.
- (2) *Parker-Knoll Ltd. v. Knoll International Ltd.* [1962] R.P.C. 265, 278.
- (3) *Singer Manufacturing Co. v. Loog* (1880-81) 18 Ch. D. 395, 412.
- (4) *J.B. Williams Company v. R. Bronnley & Co. Ltd.* (1909) 26 R.P.C. 765, 771.
- (5) *Schwepes Ltd. v. Gibbens* (1905) 22 R.P.C. 601, 607.
- (6) *Spalding v. Gamage* (1915) 32 R.P.C. 273, 284.
- (7) *Payton & Co. Ltd. v. Snelling, Lampard and Co. Ltd.* (1900) 17 R.P.C. 48.
- (8) *Payton & Co. Ltd. v. Snelling, Lampard and Co. Ltd.* (1900) 17 R.P.C. 628, 634.
- (9) *Saville Perfumery Ltd. v. June Perfect Ltd. and F.W. Woolworth & Co. Ltd.* (1941) 58 R.P.C. 147, 161.
- (10) *Thomas Bear & Sons (India) Ltd. v. Prayag Narain & Jagannath* (1941) 58 R.P.C. 25, 28.
- (11) *White Hudson & Co. Ltd. v. Asian Organization Ltd.* [1965] 1 M.L.J. 186.
- (12) *Johnston v. Orr Ewing* L.R. (1882) 7 App. Cas. 219.
- (13) *Taverner Rutledge v. Specters Ltd.* [1959] R.P.C. 83, 87.
- (14) *Byrant & May Ltd. v. United Match Industries Ltd.* (1931) 50 R.P.C. 12, 20.
- (15) *University of London Press Ltd. v. University Tutorial Press Ltd.* [1916] 2 Ch. 601, 610.
- (16) *Claudius Ash & Sons Ltd. v. Invicta Manufacturing Ltd.* (1912) 29 R.P.C. 465, 475.
- (17) *Wright Layman & Umney Ltd. v. Wright* (1949) 66 R.P.C. 149, 152.

FEDERAL COURT.

R. J. Burrell Q.C. (V. L. Kandan with him) for the appellants.

G *L. P. Thean (Chan Siew Yoon with him) for the respondents.*

Gill C.J. (Malaya): This is an appeal by the plaintiffs in the action from a judgment of Abdul Hamid J. dismissing with costs their claim for an injunction to restrain the respondents, defendants in the action, from passing-off or attempting to pass-off or causing, enabling or assisting others to pass-off for tea not the goods of the plaintiffs as and for the goods of the plaintiffs. A claim in the same action for an injunction to restrain infringement by the defendants of the plaintiffs' trade marks was also dismissed, but there is no appeal from that part of the learned judge's judgment.

The plaintiff company was first established in 1929. Since then they have been trading as growers, manufacturers, packers and sellers of tea in Malaya under the name of "TIGER TEA" in respect of which they are the proprietors of trade mark No. M/24707 which was registered on September 7, 1954 and is still subsisting. They also sell their tea under the more familiar